Marquette Law Review

Volume 5
Issue 2 *Volume 5, Issue 2 (1921)*

Article 3

Some Popular Criticisms of Courts

Honorable Walter C. Owen

SOME POPULAR CRITICISMS OF COURTS

HON. WALTER C. OWEN,
Justice of the Wisconsin Supreme Court.

This is a government of law. A wholesome respect for the law gives assurance of its easy maintenance. Upon the confidence reposed in courts depends in large measure the respect entertained for the law. The courts constitute that branch of government established to apportion and administer justice to its citizens according to the preconceived notions of the majority as reflected by laws of their enactment.

Human nature cries out for justice. That is the one thing above all others for the attainment of which men will sacrifice their lives. If they feel that it cannot be attained through existing institutions, we must recognize their disposition to rebel against such institutions and the instincts which impel them to attain justice by other means.

According to our present enlightenment, there can be a no more just form of government than that which accords to every person an equal voice therein and affords a way of intrenching the will of the majority as the law of the land, if that will, expressed in statutes, is correctly interpreted and sternly enforced without fear or favor by the courts. The minority cannot insist upon their views. It is for them to acquiesce in and abide by the expressed will of the majority. If they fail to do this, and attempt by force to impose their own views on the majority, or to interfere with the conduct of government as ordered by the majority, they become enemies of society and should be promptly and sternly dealt with as such.

The minority has every right, however, to propagate and disseminate their views, and when such views are embraced and approved by a majority of the people they may, in a well-ordered manner, mold such ideas into the law of the land.

Unless we have reached the millenium, we have every right to expect a certain amount of unrest and dissatisfaction with things as they are. Absolute peace, contentment and security could be attributable only to the coming of the millenium or to the mental stagnation of our race. A little kicking is a healthful sign. It gives evidence of life. It indicates an appreciation of and a desire to attain something higher and better. It creates progress. So

far as such dissatisfaction manifests itself in legitimate ways and through legitimate channels it is not to be deplored nor should it be restrained. Our constant effort should be to make the lawful way the effective way of attaining the will of the majority.

The people have created the courts as an arm or branch of their government to administer and enforce their laws. In the discharge of this function the people have a right to demand fidelity. The manner in which courts respond to this function is a legitimate subject of discussion. As said in *State ex rel Attorney General vs. Circuit Court for Eau Claire County,* 97 Wis. 1, at p. 12:

> "Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and a free publication of the citizen's sentiments 'on all subjects'."

This fundamental right of the citizen is coming to be indulged more and more. Whether rightly or wrongly, there is abundant evidence of a growing dissatisfaction on the part of the people with the manner in which courts are performing the functions imposed upon them under our form of government. The subject has received the attention of presidents and ex-presidents, publicists and statesmen, lawyers and judges, and has been held of sufficient importance to be accorded mention in a President's Message to Congress and in a national political platform.

In his first message to the 61st Congress, President Taft said:

> "The deplorable delays in the administration of civil and criminal law have received the attention of Committees of the American Bar Association and of many State Bar Associations, as well as the considered thought of judges and jurists. * * * Of course these remarks apply quite as well to the administration of justice in state courts as to that in federal courts, and without making invidious distinction it is perhaps not too much to say that, speaking generally, the defects are less in the federal courts than in the state courts. The expedition with which business is disposed of both on the civil and criminal side of English courts under modern rules of procedure makes the delays in our courts seem archaic and barbarous."

The platform of the Progressive Republican Party, for 1912, demanded "such restriction of the power of the court as shall

leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy" and pledged itself to provide "that when an act passed under the police power of the state is held unconstitutional under the state constitution by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote upon the question whether they desire the act to become a law notwithstanding such decision."

In an introduction to a book entitled *Our Judicial Oligarchy* Senator La Follette gave expression to the following sentiment:

> "The judiciary alone, of all our institutions of government, has enjoyed for many years almost complete freedom from hostile criticism. Until very recently, this branch of our government stood alone above the legislative and executive departments in popular esteem. Unresponsive, and unresponsible to the public the courts dwelt in almost sacred isolation.
>
> "Within the last two or three years the public has begun to turn a critical eye upon the work of the judges. The people in their struggle to destroy special privilege and to open the way for human rights through truly representative government, found barrier after barrier placed across the way of progress by the courts. Gradually the judiciary began to loom up as the one formidable obstacle which must be overcome before anything substantial could be accomplished to free the public from the exactions of oppressive monopolies and from the domination of property interests. A new problem entered into the movement toward democracy —the problem of removing the dead hand of precedent from the judiciary and infusing into it the spirit of the times. So the people, in their need, dropped the unquestioning veneration which custom has fostered as a shield for the judges, and began to examine into the tendencies and practices of the courts. * * * The judiciary has grown to be the most powerful institution in our government. It, more than any other, may advance or retard human progress. * * * The regard of the courts for fossilized precedent, their absorption in technicalities, their detachment from the vital, living facts of the present day, their constant thinking on the side of the rich and powerful and privileged classes have brought our courts into conflict with the democratic spirit and purposes of this generation. * * * They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation. And because this tremendous power has been so generally exercised on the side of the wealthy and powerful few, the courts have become at last the strongest bulwark of special privilege."

The sentiment just quoted is by no means isolated, and is selected for use here because it is conveniently at hand. Similar expressions have come from many others, including Judge Seymour D. Thompson, in an address before the State Bar Association of Texas in 1896. While discussion of this character has not been so prominent for the last two years, or since our engagement in the world war, it may be said that neither has discussion with reference to other internal affairs been so prominent. Now that the war is closed we may expect public attention to recur to this along with other questions relating to internal affairs; and it is to be noted that only recently the American Federation of Labor indulged in a denunciation of courts for their alleged usurpation of power.

The evidence adduced is sufficient to indicate a feeling on the part of the people that the courts are falling down in the performance of their functions in at least these respects: (1) Unwarranted delays in the administration of the law; (2) An undue regard for precedents and technicalities; and (3) A too willing disposition to nullify acts of the legislature by condemning them as unconstitutional.

It will not do to cynically waive these charges aside. They must be met. If they are based on facts they are serious. If not based on facts then the charges themselves constitute a serious matter because they unjustly reflect upon the fidelity of courts and detract from their usefulness in maintaining order and stability, peace and tranquility among our people. The first and sensible thing to do, therefore, is to ascertain whether these charges are founded on facts. This is a matter concerning which the public is entitled to be advised. I have great confidence in the combined judgment of the American people when that judgment is based upon an understanding of the facts; and if they are given the facts I have no doubt that the people will deal wisely and justly with this subject.

It is due to the people of this state, and to the members of the judiciary as well, that the facts involving the fidelity of the judiciary of the state be declared. It is my purpose to review the judicial situation in this state so far as it has a bearing upon these general criticisms which have been leveled at the courts.

I can understand that the propriety of my doing this, inasmuch as I am now a member of the judiciary, may be at once questioned. That matter has been thoroughly considered by myself

and, after consultation with the late Chief Justice Winslow, it seemed to us not altogether inappropriate that I should do this. This is a matter that was on my mind long before I became a member of the court. I have had a feeling for many years that these criticisms hurled at courts in general were unjust so far as the judiciary of the State of Wisconsin is concerned, and that somewhere, someone should make an effort to place the citizenship of this state in possession of the facts as they relate to the judiciary of this state in these particulars. The judicial history of this state to which I shall refer was made up before I became a member of the court. The history of the court to be hereinafter treated, was not of my making in any particular. That is one reason why I feel that I may properly undertake this task. Another reason is, that it is not my purpose to assume the rôle of defender of the court in any sense, but rather to here produce, and make something in the nature of a quasi-public record to which persons interested in the subject may have convenient reference, the simple facts of the case.

With the exception of the circuit courts of Milwaukee county, the courts of record of this state are fully abreast of their work. In Milwaukee county the circuit courts are something more than a year behind with the court's business. It is doubtful, however, whether this situation may be properly attributable to the courts or to the procedure of the courts. Milwaukee is a large city and gives rise to a great volume of trial work. The six circuit judges of that county hold court continuously except for a short time during a summer vacation. They are devoting their entire time to the dispatch of business, and contribute so far as they are able to the disposition of pending cases. It is altogether likely that the congestion there means that there is more work than the number of judges which the law has provided can dispatch. A situation of this kind is not attributable to the fault of the courts nor can it be cited as justification for criticism of judicial procedure. It simply means that the legislature has not provided sufficient judges to promptly dispatch the business. As above stated, all other courts of record of the state are fully up with their work.

In every county of the state there are two regular terms of the circuit court during the year, and a number of special terms. These regular terms are approximately but not exactly six months apart. If a litigant commences a lawsuit just too late for the first term, he may expect that it can be brought to trial and dis-

posed of at the next term, which should not be later than seven months from the time of the commencement of the action. If he commences his action thirty days prior to the term it is possible for him to have the action disposed of at that term, in which case he is able to have his action tried and disposed of in the circuit court within from thirty to sixty days after its commencement. This relates to jury cases. Court cases may be disposed of at special terms and can be brought to trial much more frequently.

There are two terms of the supreme court during the year; one is known as the August term, the other as the January term. Any cause filed in that court before the fifteenth day of August is placed on the August calendar. Any cause filed before the first day of January is placed on the January calendar. A cause placed on the August calendar will be decided not later than the first of March. Any cause placed on the January calendar will be decided not later than the first of July, save in rare and exceptional cases. Any cause filed too late to go on the August calendar will nevertheless be placed on the January calendar and be decided before the first of July following. Any cause filed too late to go on the January calendar will be placed on the August calendar and, in the ordinary course of events, will be decided before March 1, following. It is the rather exceptional case that is not disposed of by the supreme court in less than a year after it has been filed in that court, and it may be decided within two months after it has been so filed. Any litigant, therefore, has a right to expect that a case instituted by him may be brought to trial in the circuit court within seven months after its institution, and that if appealed to the supreme court it will be decided by that court within a year after it is there filed. Where a longer time is consumed it is not attributable to the fault of the courts or to the judicial system of the state. We all know of course that not all cases are disposed of with this dispatch. But the point is that any delay beyond the periods of time indicated is not attributable to the courts. Of course there are many cases complex in their nature, which require much time for preparation and call for testimony from a multitude of witnesses, which are not and cannot be disposed of as expeditiously as the ordinary lawsuit. The interests of justice demand that there be a certain amount of deliberation in the matter of the preparation, trial, consideration and decision of a lawsuit, and it frequently happens that, in order to permit both parties to the controversy to fully and properly present their sides of the case,

concessions extending time, continuances over the term, etc., must be granted. But such instances are not attributable to derelictions, usurpations or other faults on the part of the court, or judicial procedure.

We will all agree, however, that there are too many needless continuances of lawsuits over the term, which have a tendency to unduly protract litigation and delay the settlement of controversies. My experience at the Bar leads me to remark that attorneys are oftentimes disposed to accept rather specious reasons as an excuse for letting a case go over the term. Such practice is responsible in no small degree for the impression prevailing in the minds of laymen that justice is anything but speedy, and not knowing where else to lay the blame they blame the courts. Needless continuances of cases over the term should be discouraged, and this for the benefit of the attorneys as well as the litigants and the good standing of the courts. The business man of today, he who has business to entrust to lawyers, is a man of decision and action. He wants matters closed up, controversies settled. A lawyer who disposes of his business and secures results commends himself quite as much to his favorable consideration as one who has greater prowess and learning in the law but who lacks in the faculty of getting things done. Energy, attention to and disposition of matters entrusted to the lawyer's care, is quite as much a factor in winning clients and fixing his standing at the Bar as legal acumen and learning. To the lawyer there is everything to be gained and nothing to be lost by bringing his cases to an early and speedy trial. In addition, this will go a long way towards rendering obsolete the remark upon the law's delays.

To gratify my curiosity concerning the average life of a lawsuit I secured data from 82 cases pending before the supreme court, disclosing the time of the service of the summons and the time of the final disposition by the court of last resort. It may be of interest to know that the average time elapsing from the service of the summons to the final disposition as disclosed by such data was twenty-three months. Fourteen cases, or seventeen per cent., were decided by the supreme court within a year after the service of the summons; two within five months; two within seven months; two within nine months; one within ten months; one within eleven months; and six within twelve months after they were begun. This shows what can be done in this state under favorable conditions by an aggressive and vigorous attorney.

It should be remarked that the time intervening between the decision of the case in the circuit court and the filing of the papers in the supreme court depends much upon the vigor with which the attorney prosecutes his appeal. He may appeal promptly or he may permit it to drag, in which instance of course the spread between the decision in the circuit court and in the supreme court is bound to be greater. Nineteen of these cases, or twenty-three per cent., were decided by the supreme court between twelve and eighteen months after they were started. Eighteen, or twenty-two per cent., were decided between eighteen and twenty-four months after they were begun. Sixty-two per cent. of the cases, therefore, were decided by the court of last resort within two years after they were started. The decision of the supreme court in but seven of these cases, or eight per cent. of the whole, was delayed more than three years from the time they were started.

Adverting to the criticism that courts are disposed to magnify technicalities at the expense of justice, it is unnecessary to say that at the present time in the state of Wisconsin justice is not sacrificed by reason of technical considerations. I do not recall a single case that has been reversed since I became a member of the supreme court, for purely technical reasons. One who expects a reversal of his case at the hands of that court must now assign as error something which goes to the merits or to the justice of the case. No longer are cases reversed for a mere slip of the tongue in charging the jury, or for any error unless it probably affected the result. During my administration of the office of attorney general, covering the five year period from 1913 to 1918, but four criminal cases were reversed.

When a case is considered by the supreme court, final disposition thereof is made if possible. The effort is to end and not to protract litigation. Judgment is ordered upon the record as it stands, if it is possible to do so. A perusal of cases reported in 167 Wis., disclosed that thirty-five out of ninety-eight, or practically thirty-five per cent. of the whole, were reversed. Of the thirty-five reversed, twenty-three were remanded with instructions to render judgment, and only twelve were remanded for a new trial or for further proceedings.

The average number of cases instituted in the state upon which a suit tax was paid, for the six years ending July 1, 1918, was 8,820 per year. The cases coming to the supreme court averaged not more than 400 per year. This means that less than five per

cent. of the cases started reached the court of last resort. Of those about one-third are reversed, and of those reversed only one-third are remanded for a new trial.

From all this we see that so far as the state of Wisconsin is concerned there is little occasion for the assertion that prompt and speedy justice cannot be secured. If a litigant employs the right kind of an attorney, unless he has an extraordinary case, he can secure a trial and an adjudication of his rights in the circuit court within seven months from the commencement of his action. In ninety-five per cent. of the cases that settles the matter, as only five per cent. of the cases started are appealed to the supreme court. If his case is appealed promptly, he may expect a decision of that court at any time from three to fourteen months after the filing of the appeal.

This would seem to afford scant justification for the suggestion that the administration of justice is delayed through inefficient or unbusinesslike administration of the courts of Wisconsin.

In preparing a paper on another occasion I secured some data which, while not strictly apropos of what we are discussing nevertheless is not wholly unrelated, and I think will be of interest. I had thought to exalt the courts of Wisconsin, by comparison with other state courts, in the matter of the dispatch of business. It had been my understanding that the supreme court of the state of Wisconsin stood out rather prominently as one of the few courts that was up with its work. I therefore addressed letters to the clerks of the supreme courts of the various states of the Union asking them for information concerning the state of business in their courts. I met with courteous replies from all but three. These replies revealed somewhat to my surprise that a great proportion of the courts of last resort were entirely abreast of their calendars and up with their work, only fourteen states reporting that their courts were behind. It appeared that Colorado was two years behind with its work; California, one to two years; Oregon, one year; Missouri, two years; Nebraska, one year; Idaho, two years; New York Court of Appeals, two years; Montana, two years; Louisiana, two and one-half years; Texas, two years; Kentucky, nine months; and Indiana, two years.

In Oklahoma the civil division was one thousand cases behind in its work and the criminal division five hundred cases behind; but it was not stated how long it would take to dispose of those cases; so that while it is certain that the supreme court of Okla-

homa is considerably behind with its work, it cannot be stated definitely how far behind it is, measured in terms of time.

From the state of Georgia it was reported that at the close of the March term, which occurred on the first Monday in October, 1918, three hundred cases which had been submitted were undecided.

It was interesting to note that the cases pending before the courts ranged all the way from five in the state of Delaware to 1,500 in the state of Oklahoma. From many of the states reporting an accumulation of work it was stated that measures for relief were in contemplation.

From this information it may be expected that in the near future the state courts of the entire country will be placed upon a basis enabling them to take care of the work in due course, and that the conditions justifying criticism of courts' delays will be eliminated so far as courts of last resort are concerned. There is reason to believe, however, that in many of the larger cities of the country trial courts are most exasperatingly behind with their work. In Chicago, for instance, a trial of a case within three or four years after its commencement is not to be thought of.

Let us now refer to the decisions of the supreme court of this state to see whether that court has unduly interfered with the carrying out of what we may call the progressive program of the state. In so doing, I shall assume the power of the court to declare laws unconstitutional. The power of the court in this respect is declared by some, judges among them, to have been usurped. However, the power of the courts in this regard is now too well established to be a judicial question. I apprehend that it would be rather startling for a court at this time to renounce its power and its duty in this respect. If it is thought that this power does not properly reside with the courts, it may be changed by constitutional amendment. But whether it should be or not is a political question, and one with which we are not here concerned.

The last twenty years mark an epoch in the history not only of this state but of the nation. The people have more actively participated in the affairs of government and have insisted that government should more fully respond to public interests. Many laws have been enacted calculated to destroy special privilege and to promote the public interest. In this state there are at least ten such laws, laws of statewide interest, importance and influence, laws somewhat new and novel, which I shall designate as laws of major importance. These laws were (1) a law imposing upon

railroad companies certain penalties for failure to pay their taxes; (2) an ad valorem tax law for railroads; (3) an inheritance tax law; (4) a law establishing a Railroad Rate Commission; (5) a primary election law; (6) a civil service law; (7) a workmen's compensation act; (8) water power legislation; (9) income tax law; and (10) forestry legislation. The nature of these laws is well understood by the people of this state and further specification of their provisions is unnecessary.

The constitutionality of all these laws was challenged in the courts of this state. They were not only challenged, but they were challenged vigorously. They were challenged by the powerful interests of the state. The challenge was backed up by the ablest counsel of the state. The result was that every law was held constitutional, except the water power and the forestry law.

The decision of the supreme court vindicating the railroad tax penalty law will be found in 128 Wis. 449; the ad valorem law, in 128 Wis. 553; the inheritance tax law, in 129 Wis. 190; and again in 139 Wis. 544; the railroad commission law was upheld as constitutional in 136 Wis. 146; and again in 163 Wis. 145; in a subsequent case, that of the *Northwestern Railway Company vs. The Railroad Commission,* reported in 156 Wis. 47, an attempt was made by the railroad company to secure a construction of the law which would seriously limit and embarrass the railroad commission in the performance of its functions. It was there contended that the commission's decisions must be based upon evidence produced and introduced at the hearing, and that it could not take into consideration knowledge of an expert nature within the possession of the commissioners, or so called judicial notice of certain reports and records on file in its office. This contention was repudiated by the court and the power and authority of the commission greatly vitalized.

The primary election law was sustained in 142 Wis. 320; the civil service law, in 146 Wis. 291; the workmen's compensation act, in 127 Wis. 327; the income tax law, in 148 Wis. 456.

The only laws of major importance condemned by the court, as already stated, were the water power law, 148 Wis. 124, and the forestry law, 160 Wis. 221. The water power law declared that all water powers belonged to the state, denied any private ownership thereof, and prescribed regulations for their development upon such hypothesis. The court held that the right to use the water of a navigable river for the creation or development of

power upon his own land is a riparian right appurtenant to the land and belongs to the owner of such land, which the state could not take away without due compensation.

This is the only instance in which major legislation was denied constitutionality by the supreme court at the suit of private interests. The forestry case did not represent a contest between public and private interests. The constitutionality of that law was raised by the state itself, and both sides of the case were presented to the court by attorneys paid by the state, so that in the litigation resulting in the condemnation of the law the public was represented on both sides. The only instance, therefore, where major legislation in the interest of the public met with judicial condemnation at the suit of private parties is the decision of the court in the water power case. Whether that case was decided rightly or wrongly must be a matter of individual opinion. It is not the purpose of this article to defend the court in any of its decisions, but rather to place before the public facts with reference to the general attitude of the judiciary of this state towards legislation enacted in the public interest.

In addition to this major legislation, a number of laws enacted for the purpose of promoting equality and the public welfare, which have been assailed as unconstitutional, but sustained, may be mentioned. The program has included numerous laws for the purpose of bringing about a more efficient enforcement of the taxing power of the state in order to promote equalization of the burdens of taxation. The laws creating the office of county supervisor of assessment, who, the law provided, should be appointed by the county board, was assailed on the ground that it violated sec. 4, art. 6 of the Constitution, for the reason that, being a county officer, he should be elected by the people. This contention was repudiated in *State ex rel Williams vs. Samuelson,* 131 Wis. 499.

Ch. 215 of the Laws of 1905 provided for the appointment of persons by the State Tax Commissioners to assess the property of a particular assessment district or to review the assessment made therein when certain complaint was made to the tax commission. The tax commission declined to act under this law for a number of years, regarding it as unconstitutional legislation, and counseled its repeal by the legislature. The legislature refusing to repeal the law, however, the state tax commission finally acted under it, and the constitutionality of the law was promptly brought

in question. Its constitutionality was affirmed in *State ex rel Hessey vs. Daniels,* 143 Wis. 649.

In this connection should also be mentioned the case of *Northwestern Mutual Life Ins. Co. vs. State,* 163 Wis. 484, sustaining the statute imposing taxes upon life insurance companies. The Northwestern Life Insurance Company, deeming this law to be unconstitutional, paid its taxes under protest, and brought action to recover back from the state taxes paid by it amounting to approximately one million dollars. The law was held constitutional by the court, which decision was affirmed upon an appeal to the Supreme Court of the United States.

A law providing for the appointment of jury commissioners by circuit judges was upheld as constitutional in 133 Wis. 461.

A law providing for the election of trustees by the county board to have charge of county institutions, was upheld in *State ex rel Busacker vs. Groth,* 132 Wis. 263.

The appointment of a committee by the legislature to investigate and obtain information in regard to the working of the primary election law, with a view of enacting further laws on the subject, with authority to the committee to spend moneys in the course of such investigation, was challenged in the courts, but the authority was sustained in *State ex rel Rosenhein vs. Frear,* 138 Wis. 173. This decision was of great importance in promoting intelligent and well-considered legislation.

In *State ex rel Williams vs. Sawyer County,* 130 Wis. 634, it was held that in matters purely local and municipal the legislature may enact a constitutional law and refer to the people or proper municipal authorities to decide whether such law shall or shall not have force and effect in their respective municipalities, but such law must be a complete enactment in itself.

In *State ex rel Wickham vs. Nygaard,* 139 Wis. 396, it was held that the salary of a state officer was not exempt from income taxes.

In *State vs. Lange Canning Company,* 164 Wis. 228, it was held that a law empowering the industrial commission to prescribe hours of labor for females was not unconstitutional as being an unlawful delegation of power.

In *Kiley vs. C. M. & St. P. R. Co.,* 138 Wis. 215, the constitutionality of Ch. 244, Laws of 1907, which made every railroad company liable for damages for all injuries whether resulting in death or not, sustained by any of its employees (1) When such injury was caused by a defect in any locomotive, engine, car, rail,

track, roadbed, machinery or appliance used by its employees in and about the business of their employment; (2) When such injury shall have been sustained by any officer, agent, servant or employee of such company, while engaged in the line of his duty as such and when such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant, or employee of such company in the discharge of, or by reason of failure to discharge, his duty as such. It was provided that the provisions of the act shall not apply to employees working in shops and offices. This law was assailed by the railroad company on the ground that it singled out railroads from all other employers and made them liable for injuries sustained by their employees under circumstances which do not subject any other employers of labor to like damages, by reason of which the law was discriminatory and denied the railroads the equal protection of the law.

A court having a penchant for annulling acts of the legislature and for protecting special interests could very well have adopted the contention of the railroad company in that case. The court, however, held that the peculiar hazards incident to the operation of railroads distinguished that from any other business and furnished a proper basis for classification. It was not so easy, however, to justify the sub-classification by which shop and office employees were excluded from the provisions of the act. The act included within its provisions all railroad employees except shop and office employees. It included employees engaged in cutting grass upon the railroad right of way, or building fences, or building bridges, or doing work of construction and engineering, or providing supplies such as ties and a great many other things that might be mentioned having no connection whatever with the operating feature of a railroad, which only is characterized by special railroad risks. The court nevertheless justified the sub-classification and held the law constitutional. Instead of presenting a situation where a court introduced refined distinctions for the purpose of condemning a law, the profession generally will agree that distinctions were refined here rather for the purpose of upholding the law. It is worth while to make special mention of this case in view of the fact that it was a law enacted in the interests of railroad employees; that its constitutionality was not only vigorously attacked, but the attack was supported by at least very plausible argument, which the court might well have adopted

in pursuance of a disposition to use the constitution as a shield and protection for special and corporate interests.

The case of *Milwaukee Electric Railway & Light Co. vs. Railroad Commission,* 153 Wis. 592, also involved a question of the greatest importance to the people of the state. The ordinance of the city of Milwaukee granting a franchise to the Railway Company fixed the fare to be charged by the company at five cents. The question was whether this ordinance constituted a contract which was protected by constitutional provisions and deprived the state of power to change the rate of fare, as contended by the street car company. It was held that the ordinance did not divest the legislature, through its created agency the Railroad Commission, of the power to prescribe reasonable rates of fare. Time will not permit the elaboration necessary to fully point out the importance and far reaching effect of that decision. Suffice it to say that it was a great victory for the public.

The Wisconsin Workmen's Compensation Act was one of the first to be enacted in this country. The constitutionality of this act was not only upheld by our court after compensation acts had been annulled in New York and one or two other states, but the court did a great deal prior to the passage of the act to stimulate sentiment resulting in its enactment. On numerous occasions, in writing opinions in personal injury cases, the court went out of its way to call attention to the injustice of established principles of law, which too often laid upon employees engaged in hazardous pursuits the entire burden of accidents inevitable in the industry. Thus, in a concurring opinion in *Driscoll vs. Allis-Chalmers Co.,* 144 Wis. 468, Chief Justice Winslow said:

> "I agree that under existing rules of law this judgment must be reversed."

After a discussion of the principles of law applicable to the situation, he continued:

> "It gives me no pleasure to state these long established principles of the law of negligence. I have no fondness for them. If I were to consult my feelings alone I would far prefer to let the case pass in silence. No part of my labor on this bench has brought such heartweariness to me as that ever-increasing part devoted to the consideration of personal injury actions brought by employees against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of

> law which either deny relief entirely or necessitate a new trial make drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself. If it be said that some of these rules are archaic and unfitted to modern industrial conditions I do not disagree; in fact that has been my own opinion for long."

Similar language was used by Justice Marshall in a dissenting opinion in 140 Wis. 457, as well as in an independent opinion in 144 Wis. 353.

It is proper to state at this time that there were fifteen lawyers in the state senate, but two less than a majority of that body, when the Workmen's Compensation Act was passed. Every lawyer voted for the passage of that bill. Every lawyer realized that the enactment of such a law would result in a pecuniary loss to the profession in general and to him in particular. One lawyer, a member of the senate who voted for the bill, assured me that its passage meant the elimination of fifty per cent. of his income. The incident but typifies the generous and unselfish disposition of the legal profession. No other class so willingly subordinate individual or selfish interest to that of the public welfare.

But to return to our subject. The point I am making could be illustrated by other cases, reference to which time forbids. In many cases, not herein referred to, has the constitutionality of laws been sustained. I have deemed it sufficient for the purposes of this article to select those more important laws placed upon our statute books as the result of political struggle curtailing the power and privilege of special interests, making the government serve the people and, generally, promoting what the late Hon. Theodore Roosevelt would call "a square deal." It must be admitted that in carrying out as comprehensive a program for such purpose as has been conceived by any state of the Union, the people of this state have been singularly free from judicial obstruction or interference.

But it should not be inferred that the court abandoned its judicial functions or evidenced timidity or lack of courage in grappling with constitutional questions. It has not hesitated to condemn legislation deemed by it to be unconstitutional and has at all times taken a courageous view of its duty when the constitutionality of statutes has been challenged. Though taken from a dissenting opinion, the following language by Mr. Justice Marshall faithfully reflects the conception of the court, as it was con-

stituted during the period we are considering, of the nature and character of its duty whenever questions concerning the constitutionality of statutes were before it, and its reported decisions indicate that it was at all times guided by the principles expressed by the learned justice, as follows:

> "The most important judicial authority lodged in this court is that of passing upon the validity of legislative enactments. That great power is given to the court by the constitution, as definitely, if not as expressly, as power is given to the legislature to enact laws. In its special field the court is absolutely independent. It is answerable only to the people as their will is seen in the fundamental law. The power is not discretionary, now to be exercised and then not to be, according as mere expediency may seem to dictate. It is obligatory in character as to every situation legitimately invoking its activity. It must be jealously guarded and courageously vindicated upon all proper occasions, if our constitutional system of liberty is to endure.
>
> "Those who are wont to regard activity of the court's power mentioned as an unwarrantable, or at least a regrettable interference with legislative authority, evince want of comprehension of our system of government or want of appreciation of the broad scope of those constitutional limitations designed to guard at all points every individual in the enjoyment of every right essential to those fundamentals: 'life, liberty, and the pursuit of happiness' for which 'governments are instituted among men, deriving their just powers from the consent of the governed.'
>
> "The importance of our constitutional restraints and the high prerogative power of applying them, is as progressive as is the need for regulation, to the end that such regulation may not overleap its legitimate boundaries and enter the domain of the destructive. It will be a sorry day for our country when the time comes, if it ever does—let us hope and believe that it never will—that the invincible weapon—the constitution—vitalized by an independent and fearless judiciary, shall not efficiently bar excursions into the domain of unbridled interference with individual rights.
>
> "If that is more important to any one element in society than to another, it is the weakest, hence the most helpless. So it is of the highest importance to the public, and particularly to the most humble portion thereof, that courts should grapple, willingly and effectively, with every question presented for solution involving validity of legislation on constitutional grounds.
>
> "How wisely the fathers must have looked into the future when—with the evident purpose of their language being regarded as a command from the body of the people to all in authority, so long as the constitution should endure—they

penned the words: 'The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.'

"The saying that the court of last resort should willingly apply the test of constitutional limitations, is not to be taken as suggesting judicial desire or haste to declare that not law which has the form of law. In no case should the court enter upon any doubtful ground. It should accord to the coördinate department the highest consideration, not condemning its action so long as any reasonable basis can be discovered for upholding it, but if none can be discovered, not hesitating to put the stamp of judicial disapproval upon it."

But as evidence that the court appreciated the difficulties of accommodating a fixed and unyielding constitution to the ever changing conditions, problems and ideals of the people, as well as its disposition to go to the uttermost lengths of reconciling legislative action with constitutional limitations, I quote the language used by Chief Justice Winslow in the opinion of the court upholding the constitutionality of the Workmen's Compensation Act *(Borgnis vs. Falk,* 147 Wis. pp. 348 and 349) which, in my judgment, time will embalm as a legal classic:

"In approaching the consideration of the present law we must bear in mind the well established principle that it must be sustained unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition.

"That governments founded on written constitutions which are made difficult of amendment or change lose much in flexibility and adaptibility to changed conditions there can be no doubt. Indeed, that may be said to be one purpose of the written constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time. But the difficulty is that, while the constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third;

the race moves forward constantly, and no Canute can stay its progress.

"Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office. But when there is no such express command or prohibition but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present-day people and conditions?

"When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

"Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation."

These two quotations fully reveal the attitude and disposition of the court as then constituted, and from them we may judge that the court at all times fearlessly discharged its serious responsibility in the matter of vindicating and preserving those safeguards provided in, and the sacred rights protected by, the constitution, at the same time sincerely striving to adapt a constitution made by former generations to the conditions and problems of the present time.

Will not the judgment of the people construe their views as broad and generous, their discharge of duty fearless and wise?

Address read before Wisconsin and Minnesota State Bar Association Conventions, 1920.